No. 253

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In the Supreme Court of the United States

OCTOBER TERM, 1957

RONALD MILLER, ET AL., *Petitioners*

v.

ROBERT W. JENNINGS, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES AND ROBERT W. JENNINGS AND W. F. RESCH IN OPPOSITION

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The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. App. 17-23) is reported at 243 F. 2d 157.

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JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1957. The petition for a writ of certi-

orari was filed July 9, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the waiver of sovereign immunity contained in Section 208 of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, embraced claims of the character asserted by petitioners here.

STATUTE INVOLVED

Section 208 of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides:

> SEC. 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.
>
> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

* * * * * * * *

STATEMENT

Hudspeth County Conservation and Reclamation District No. 1, a Texas public corporation, and five individual landowners, purporting to represent all the landowners of the Hudspeth District, brought this action in the District Court of Hudspeth County Texas, against Robert W. Jennings, the Regional Director of the Bureau of Reclamation, W. F. Resch the Project Manager of the Rio Grande Reclamation Project, and the United States of America. Other defendants were eleven individual landowners residing in Texas, sued individually and as representatives of all landowners and water users, in New Mexico as well as in Texas, claiming adversely to plaintiffs in rights to the use for irrigation of the waters of the Rio Grande river between Elephant Butte Dam, in New Mexico, and the El Paso-Hudspeth County line in Texas. The El Paso County Water Improvement District No. 1, another Texas public corporation, and the manager of that District were also defendants.

The Rio Grande Reclamation Project is operated by the United States for the purpose of impounding and distributing the waters of the upper Rio Grande river, primarily for irrigation purposes. The waters are impounded at Elephant Butte Dam and Reservoir and Caballo Dam and Reservoir in New Mexico, about 125 and 80 miles, respectively, north of and upstream from El Paso. The waters are distributed through a series of ditches. Seepage and return flow water are

used and sometimes reused. The project serves an area extending downstream below El Paso. Nearly all the lands served or intended to be served by the project are within the Elephant Butte Irrigation District of New Mexico, lying wholly in New Mexico, or the El Paso District, a defendant, situate in El Paso County, Texas. Downstream from the project is the Hudspeth District, a plaintiff in this action, situated in Hudspeth County, Texas, which received water pursuant to certain contracts.[1]

The Court of Appeals succinctly described the nature of the seven controversies alleged to exist between petitioners and respondents as follows (Pet. App. 19-20): "Of these controversies the first is as to the effect of and priorities under the law of Texas relating to appropriative water rights; the second relates to rights in drainage waters; the third raises the question as to whether methods of financing of facilities can affect water rights; the fourth and fifth call for construction of the Warren Act, 43 U.S.C.A. § 523 et seq.; the sixth asserts that the upper Rio Grande usually has a normal measurable flow to which riparian rights attach; and by the seventh it is contended that the consumption of water for generating electric power is an unlawful invasion of the rights of users of water for irrigation."

The same plaintiffs sought practically the same relief against officials of the Reclamation Service and private parties in *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins*, 213 F. 2d 425

[1] The Hudspeth District is not, and never was, a part of the project but simply receives excess water therefrom. See *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins*, 213 F.2d 425 (C.A. 5), especially footnote 6, p. 431.

(C.A. 5), certiorari denied, 348 U.S. 833. That suit was dismissed because it constituted an attempt to sue the United States without its consent.[2] The present suit was thereafter filed in the District Court of Hudspeth County, Texas, naming federal reclamation officials, a Texas irrigation district, and individual water users as defendants. In addition, the United States was sought to be joined as a defendant under Section 208 of the Act of July 10, 1952 (R. 9). The case was removed to the United States District Court where motions to dismiss were made on numerous grounds (R. 78-79, 117-120). The court granted the motions on the ground that the United States had not consented to be sued or waived its immunity from suit in a case of the character and, therefore, that the court lacked jurisdiction.

The Court of Appeals affirmed, Judge Cameron dissenting without opinion. It held that the consent to suit in the 1952 Act did not embrace every suit involving water rights, but related only to suits for the adjudication of rights to the use of water of a river system or other source. The present case was not, the court held, a suit of that nature.

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[2] Petitioners indirectly continue the attack upon that decision made in the earlier petition for a writ of certiorari (Oct. Term 1954, No. 238) when they describe the decision as holding that *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, overruled earlier cases. The assertion is wrong because of petitioners' failure to appreciate established distinctions between the various cases. See Additional Brief for the Government Respondents in Opposition in No. 238. The *Robbins* decision is, we believe, correct. Moreover, it is controlling here since petitioners have not challenged it below and do not now urge that it be re-examined.

ARGUMENT

1. Petitioners would read the 1952 Act so as to embrace any litigation of whatever nature in which the judgment might determine water rights or control the distribution of water. The statute waiving the sovereign immunity is not so broad. It is explicitly limited to "any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights * * *." The nature of the suits referred to is well established in the water law of the western states. Because of the nature of the problem, and the fact that correlative rights of many persons are in issue, the statutes of all the western states have provided in one form or another for suits to adjudicate all rights to a particular water source. See Wiel, *Water Rights in the Western States*, 3d ed., Vol. 2, pp. 1120, 1125; *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U.S. 440, 447 *et seq.*; *In re Silvies River*, 199 Fed. 495, 503 (D. Ore.); *Washington State Sugar Co.* v. *Sheppard*, 186 Fed. 233, 235 (D. Idaho). These cases are fundamentally different from ordinary adversary litigation where the rights of only a few parties among themselves are determined. "In such a proceeding the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purposes * * *." *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U.S. 440, 449; see also *Spanish Fork West Field Irrigation Co.* v. *District Court of Salt Lake County*, 99 Utah 527, 536-537, 104 P. 2d 353, 357; *State ex rel. Hinckley* v. *Sixth Judicial District Court*, 53 Nev. 343, 352, 1 P. 2d 105, 106.

The report of the Senate Committee on the Judiciary concerning the 1952 Act is even more specific in

showing that the Act was meant to apply only to those general adjudications of all water rights in a river system, and not to ordinary individual litigation where water right questions might become an issue. The report, referring to the general adjudications, says (S. Rep. No. 755, 82d Cong., 1st sess., p. 4): "Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceeding." Printed with the report for the purpose of showing the intent of the bill is an exchange of letters between Senator Magnuson and Senator McCarran, the then Chairman of the committee. Senator McCarran said that the bill "is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream." He continued. "This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."

It is perfectly clear that the case petitioners seek to present is not of the nature just described. The Rio Grande is an interstate stream, and the federal reclamation project is an interstate undertaking. Rights in New Mexico necessarily come into play. The Court of Appeals said (Pet. App. 21): "There can be an adjudication of rights with respect to the upper Rio Grande *only in a proceeding where all persons who have rights are before the tribunal.*" But interested persons in New Mexico were not made parties to this proceeding in the Texas court. Cf. *Texas* v. *New Mexico*, 52 U.S. 991.

2. The alleged impracticality (Pet. 7-8) of joinder of all interested parties cannot justify this attempt to

adjudicate their rights in their absence. Petitioners refer to the fact that this is an interstate stream (Pet. 7). The difficulties in such cases arising from the territorial limitations of the jurisdiction of courts are resolved through the medium of original suits in this Court between the states involved. The presently pending case of *Arizona* v. *California*, No. 10 Original, is the most recent example. But the waiver of sovereign immunity in the 1952 Act did not extend to such cases by express provision of Congress, Subsection (c), *supra*, p. 3. This constitutes additional proof of the congressional intent not to extend the consent to a suit like the present one.

3. Petitioners seek to torture principles as to class actions to justify their joinder of eleven individuals purportedly as representatives of all upstream landowners. Obviously, this cannot be a true class suit where there is a joint, common, or derivative right. Nor can it be a "hybrid" class suit as petitioners try to make it by invoking *Dickinson* v. *Burnham*, 197 F. 2d 973 (C.A. 2), which concerned disposition of a fund among a class, in that instance stockholders. All the waters of the Rio Grande river cannot, by any stretch of the imagination, be called a "fund" in the hands of the Texas court. For example, one of petitioners' complaints is use of water at Caballo and Elephant Butte dams in New Mexico for power purposes. Indeed, petitioners assert that the waters in controversy are in the physical possession and control of the defendant reclamation officials (Pet. 12). Those officials are not proper parties to this case which lies, if at all, only against the United States. And the custody of the entire project is in the hands of the Secretary of the Interior. Cf. *New Mexico* v.

Backer, 199 F. 2d 426 (C.A. 10). As the court held in *Martinez* v. *Maverick County Water Con. & Imp. Dist. No. 1,* 219 F. 2d 666 (C.A. 5), a suit like the present one for a declaratory judgment as to water rights on a portion of the Rio Grande was a "spurious" class suit in which the judgment would bind only those parties before the court.

The alleged conflict with *Montezuma Canal Co.* v. *Smithville Canal Co.,* 218 U.S. 371, is likewise nonexistent. This Court was there dealing with incorporated companies. The trial court had found that individual landowners had surrendered to those companies their priorities and, by consent, water of the canal was delivered according to the interest of each owner in the canal. See 218 U.S. at p. 376. The *Montezuma* case simply means that an irrigation company represents its stockholders who formerly owned the water rights. This is made clear by the citation in *Montezuma* of *Arroyo Ditch & Water Co.* v. *Baldwin,* 155 Cal. 280, 100 Pac. 874, designating such representatives to be "either as their agent and trustee or as possessor of their former titles."

The basis for the claim of conflict with *People of the State of California* v. *United States,* 235 F. 2d 647 (C.A. 9), Pet. 8-10, is obscure. As the Court of Appeals held (Pet. App. 22), that decision is another application of the principle that all interested parties should be joined to an adjudication of rights in a stream. Apparently petitioners' argument is that there is conflict between the *California* case and another case now pending before this Court. *El Paso County Water Imp. Dist. No. 1* v. *City of El Paso,* 243 F. 2d 927 (C.A. 5), No. 198, this Term. Any conflict between those two cases has nothing to do with

this case. In fact, the *El Paso* case is not at all a general water rights adjudication in the sense of the 1952 Act but rested merely on contract issues. Specifically, the Court of Appeals said (243 F. 2d at p. 929) that it was unnecessary to discuss what petitioners say (Pet. 11) was a "sweeping pronouncement" concerning the Rio Grande compact.

CONCLUSION

There is no conflict, and the decision accords with the language of the Act, the clear intent of Congress, and the established principles in both water right litigations and class suits.[3] The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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ROGER P. MARQUIS,
Attorney.

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[3] Since this is, we believe, clear we will not extend this brief by additional considerations which likewise lead to the same result. One of these rests on the fact that the 1952 Act applies only where it appears that the United States is the owner of or is in the process of acquiring water rights. Another arises from the fact that the injunctive relief sought by petitioners attempts in practical effect to have the court supersede the Secretary of the Interior in operation of the project. If such an extreme construction were to be given the 1952 Act, a serious constitutional question would be presented. See opinion of Judge Pope in *United States* v. *United States District Court*, 206 F.2d 303, 310-311 (C.A. 9). Another substantial question would be whether landowners in Texas could, under any view of class suits, be held to represent fairly claimants to water in New Mexico. These are illustrative of the matters which will require discussion in the event the petition for a writ of certiorari should be granted.

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